In the *First Report and Order* and a series of subsequent orders in this docket and elsewhere, the Commission recognized these realities and established a regulatory structure that (with only a few exceptions) maximizes the prospects that the objectives of the 1996 Act will be fully realized, both in the short term and the long term. It is a structure that was designed to allow substantial constraints to be imposed on supracompetitive prices charged by incumbents within the initial years after the 1996 Act was passed and to foster the future deployment of alternate facilities to serve large business, small business, and residential customers whenever and wherever it is technically and economically possible to do so. However, this regulatory structure and the benefits it promises all critically depend on a single premise: the LECs' provision of the network elements set forth in Rule 51.319 on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

In contrast to resale, network elements permit entry into the entire telecommunications market, for they may be used to provide exchange and exchange access services alike. Network elements also involve substantially less "sharing" of the incumbent LECs' operations by new entrants, for they permit entrants to use the LECs' network capabilities to differentiate themselves through service definition and pricing in ways that resale does not allow. And network elements provide a critical transition to facilities-based competition, for, unlike resale, they permit entrants to learn aspects of the business, such as their customer's calling volumes and traffic patterns, that will be essential to their subsequent decisions on whether and where to deploy facilities and then to "piece-out" the network as conditions allow. It is because access to LEC network element can only advance and never retard the 1996 Act's objectives in both the

short and long terms that – in the words of Senators Lott, Stevens, Inouye and Hollings and Congressmen Bliley and Markey – Congress declined to impose any of the "extrastatutory restrictions" on the availability of network elements that the incumbent LECs have proposed.[22]

Since adoption of the *First Report and Order*, this fundamental understanding of the role of network elements and the assumption that they will be widely available has been the basis for numerous other Commission decisions implementing other provisions of the Act. The Commission has, for example, deemed unbundled network elements to be equivalent to an entrant's "own" facilities in applying the facilities-based competitor requirement of Section 271(c)(1)(A), and has determined that there will be no possibility that entrants would be able to offer "one-stop shopping" for local and long-distance service in competition with the BOCs unless and until the competitive checklist's network element and other provisions are fully implemented.[23] It has further declined to prescribe access rates to cost, relying instead on a market-based approach that depends almost entirely on the proposition that entrants will be able

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[22] *See* Brief of *Amici Curiae* The Honorable Thomas J. Bliley, Jr., The Honorable Ernest F. Hollings, The Honorable Ted Stevens, The Honorable Daniel K. Inouye, The Honorable Trent Lott, and The Honorable Edward J. Markey, at p. 5, *Iowa Utils. Bd.* v. *FCC* (filed Dec. 23, 1996).

[23] *See* Memorandum Opinion and Order, *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, 12 FCC Rcd. 20543, ¶¶ 86-101 (1997) ("*Ameritech Michigan Order*"); Memorandum Opinion and Order, *AT&T* v. *Ameritech*, 13 FCC Rcd. 21438, ¶¶ 7, 39 (1998) ("*Qwest Order*").

to place substantive downward pressure on excessive monopoly access rates by providing competing service through network elements.[24]

Each of these decisions correctly recognized that the broad availability of network elements and network element combinations is an essential precondition to any mass market competition in the near term. They further recognized, however, that the long-term significance of network elements is quite different. In the long term, while network elements will continue to be indispensable to permit competition in those areas of the country where alternative facilities will never be feasible, their principal value will be to enable a transition to facilities-based competition in all other areas of the country.

The overriding reality is that competition through the exclusive use of the incumbent LECs' network elements is neither attractive nor viable as a long-term strategy for any CLEC. As Professors Hubbard, Lehr, and Willig show, any CLEC relying on network elements faces inherent cost disadvantages relative to the incumbent that will preclude long-term success in the market *unless* the CLEC uses the leasing of network elements as a means of transitioning to its own facilities. In particular, CLECs relying on network elements face higher costs than the incumbent because of the incumbent's lack of any incentive to cooperate and ability and incentive to discriminate against them. CLECs have higher unit marketing costs and tighter margins because they must pry customers from the incumbent LEC and price below the incumbent in order to do so. CLECs further face the substantial risk that, if they ever show signs

[24] *See* First Report and Order, *Access Charge Reform*, 12 FCC Rcd. 15982 (1997) ("*Access Reform Order*").

of making substantial progress in attaining that objective, the incumbent LEC will assert its cost advantage and price its exchange and exchange access services at levels that will limit or altogether preclude effective mass market entry by CLECs.[25]

The incumbent LECs' basic position is thus exactly backwards. The incumbents assert that the Commission should restrict CLECs' access to network elements and forego the immediate competitive benefits that would follow in order to create incentives that will force CLECs to build facilities and thereby foster more desirable facilities-based competition in the future. But the incumbents' version of "tough love" for CLECs would foster competition neither in the short nor the long term. CLECs will always have powerful incentives to cease leasing network elements and to build their own facilities instead wherever the economic case for doing so is even close. CLECs need to free themselves from these tortured business relationships with their monopoly competitors and the endless litigation those dependencies generate, and to establish a different and superior cost structure under which a long-term competitive position can be successfully maintained.[26] They need no additional, artificial incentives to channel them towards that goal. Conversely, it is plain that the last thing the incumbent LECs wish to see occur is robust facilities-based competition against their monopolies, and (their rhetoric notwithstanding) they have not expended unprecedented resources in litigating these issues in order to assist the Commission in reaching that goal. Their positions on network elements would instead foreclose that result by eliminating the essential bridge which the Act created.

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[25] *See* Hubbard/Lehr/Willig Aff. ¶¶ 30-32.

[26] *See id.* ¶¶ 33-34.

II. THE ONLY CHANGES IN THE COMMISSION'S APPROACH REQUIRED BY *IOWA UTILITIES BOARD* ARE THAT THE COMMISSION MUST NOW EXAMINE THE ALTERNATIVES AVAILABLE OUTSIDE INCUMBENT LEC NETWORKS AND CONSIDER WHETHER FORCING CLECS TO RELY UPON ANY SUCH ALTERNATIVES COULD AFFECT THEIR ABILITY TO OFFER SERVICE AND NOT MERELY THE LEVEL OF THEIR PROFITS.

The Supreme Court's decision in *AT&T* v. *Iowa Utilities Board* did not call into question the congressional and Commission determinations about the critical short term and long term importance of network element access. Its holding on Section 251(d)(2) was a narrow one, and the two errors it identified in the *First Report and Order*'s treatment of the "necessary" and "impair" factors are discrete and easily corrected.

The Supreme Court reviewed two interrelated aspects of the Commission's prior consideration of the "necessary" and "impair" factors. First, the Commission had held that in considering these factors it would not even look at whether a CLEC could obtain an equivalent to the incumbent LEC's network element from a source other than the incumbent LEC, but would only "evaluat[e] whether a carrier could offer a service using other unbundled elements within an incumbent LEC's network."[27] Second, the Commission had held that in comparing the situation that would exist if CLECs were able to obtain the network element with the situation that would exist if CLECs instead had to rely upon some other network element obtained from the incumbent LEC for the same functionality, the Commission would find an "impairment" if there were any "increase [in] the financial or administrative cost [or decrease in quality] of the service a requesting carrier seeks to offer."[28]

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[27] *See First Report and Order*, ¶ 285; *see also id.* ¶ 283.

[28] *See id.* ¶ 285.

The Court held that the Commission had adopted an extreme rule which deprived the Section 251(d)(2) factors of any content. CLECs obviously would not seek to purchase more costly facilities from the incumbents' networks when those same networks contain equivalent facilities that are available and less costly. Accordingly, as the Court explained, "[s]ince any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an 'impairment' under this standard."[29]

The Court therefore held that on remand the Commission must correct these two errors in its prior analysis or identify some other "rational basis" for its requirement that these or other elements be made available. First, the Commission cannot exclude consideration of alternatives outside the LEC networks.[30] Second, the Commission cannot assume that "*any* increase in cost" "*ipso facto*" constitutes an impairment.[31] Rather, the Commission must consider whether the increase in cost that results from forcing the entrant to rely upon facilities outside the LECs' network, or any other comparative disadvantage the CLEC suffers in that circumstance, impairs "the entrant's ability to furnish its desired services" rather than merely diminishing its profits.[32]

The Court thus required the Commission to reconsider the Section 251(d)(2) factors and redetermine which network elements must be unbundled. However, the Court assuredly did *not* "evidence [an] expectation" that, following the remand, "there would not be a full platform

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[29] *See Iowa Utils. Bd.*, 119 S. Ct. at 735.

[30] *See id.* (the Commission cannot "blind itself to the availability of elements outside the incumbent's network").

[31] *See id.*

[32] *See id.*

for competitors to buy."[33] Indeed, the Court commented that its reinstatement of Rule 315(b) "could allow entrants access to an entire preassembled network."[34]

A. Under *Iowa Utilities Board*, CLECs Are "Impaired" Whenever They Would Not Be Able To Provide Their Services As Broadly, As Quickly, Or As Effectively If They Were Denied Access To An Unbundled Network Element.

The principal effect of the Court's decision, in addition to requiring that the Commission look at alternatives outside the LECs' networks as part of its analysis, is to require the Commission to refocus its evaluation of "impairment" on those disadvantages that could affect the CLECs' provision of service. The Court's example of a situation in which an increase in cost would not create an impairment is instructive in this regard. The Court hypothesized a situation in which the entrant is earning profits at "100% of investment" and, as a result of the increase in cost associated with being denied a network element, is reduced to earning profits at "99% of investment." Under that circumstance, the Court explained, the CLEC is not "*ipso facto*" impaired in its ability to provide service simply because its costs have risen and its profits have decreased.[35]

The step that the Commission did not explicitly take in the *First Report and Order*, and that it must take here, is to consider whether the cost and other disadvantages CLECs would face if they were denied access to a network element could affect their ability to provide service. The approach the Commission should take to correct the prior errors identified by the Supreme Court

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[33] *See Notice*, Separate Statement of Commissioner Powell, p. 3 n.7.

[34] *See Iowa Utils. Bd.*, 119 S. Ct. at 737.

[35] *See id.* at 735.

therefore requires a straightforward two-step analysis. First, insofar as an incumbent LEC or other opponent of unbundling identifies a putative "alternative" for CLECs to use in place of a LEC's network element, the Commission must identify any disadvantages that the CLEC will incur if forced to use that alternative as compared to using a network element. Second, the Commission must then determine whether compelling the CLEC to suffer those disadvantages could adversely affect the CLEC's ability to provide service, as opposed to merely reducing its profit margin.

In conducting the first part of that analysis, the Commission must examine several different types of potential disadvantages. It will of course need to examine any greater costs the CLEC will incur in purchasing or leasing the alternative functionality as opposed to obtaining access to the LEC's network element at TELRIC. It will also need to examine any additional higher costs the CLEC would incur in deploying and utilizing the alternative. The Commission must also assess (i) whether there any quality disadvantages associated with the alternative, (ii) whether the volume or areas in which the alternative can be used are smaller than those for which the network element could be used, (iii) whether there would be greater delay in making the alternative operational and bringing the CLEC's offering to market, and (iv) whether there are any other types of disadvantages that use of the alternative would create.

In conducting the second part of that analysis, the Commission must then consider whether any of the disadvantages that it has identified could impair the CLEC's ability to provide service. "Impair" means "to make worse; to diminish in quantity, value, excellence, or

strength."[36] A CLEC's ability to provide service is thus "impaired" by being denied access to the incumbent LEC's network element if it is unable to provide service as broadly, as effectively, or as promptly as it would if access were granted. For example, if the CLEC must reduce the number of services or features it offers or the number of customers to whom those offers may be made, if the quality of those services would decline in a way that customers would notice and care about, or if the time it takes the CLEC either to enter in the first instance or to fill orders after entry would increase, then its ability to provide service clearly has been "impaired." And because the Commission's decisions will have an immediate impact on CLECs' ability to provide service today, any such analysis must focus on the facts as they exist today, not on speculation about how the market might develop in the future.

In the *ex partes* they have filed since *Iowa Utilities Board*, the incumbent LECs have vehemently resisted this "ordinary and fair meaning" of the term "impair."[37] For example, GTE asserts that the Commission should not even examine whether denying access to network elements could affect CLECs' ability to provide mass-based residential service, because "[i]n the real world, most facilities-based CLECs effectively compete by initially targeting business centers or pockets of high-value customers within the ILECs' territory."[38] But that is simply an admission that broad scale mass market competition will not today occur in the absence of

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[36] *See* Webster's Third New International Dictionary at 1131.

[37] *See Iowa Utils. Bd.*, 119 S. Ct. at 735.

[38] *See* March 1, 1999 *Ex Parte* Letter from William P. Barr (GTE) to Lawrence E. Strickling (FCC), p. 5.

network elements – and that a CLEC that seeks to compete in that exceedingly important market segment today will thus be impaired, indeed foreclosed, from doing so if it cannot obtain access to the applicable network elements.[39]

Indeed, GTE's analysis turns the statute on its head. The whole point of the "impair" analysis is to *compare* the CLECs' service-offering capability if they obtain access to particular network elements with their service-offering capability if they do not. GTE's approach, by contrast, would enable access to network elements only to replicate the very forms of competition that it believes would otherwise occur in what GTE refers to as "the real world" – by which it means a world in which LEC network elements are unavailable. That approach is not only perverse from a policy perspective, but incoherent – for it is unclear under that approach why network elements would ever be required.

In similar fashion, Ameritech vigorously resists what it calls a "static" analysis in which the Commission focuses on "who is supplying what now," favoring instead a "dynamic" analysis that focuses on "what would or will be available" in two years, considering factors like "the potential for extension of existing alternate supply, replication of successful business models in similar locales, and the likely cost declines in alternative technologies."[40] This is an apparent admission that a factual analysis of "who is supplying what now," rather than speculation on

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[39] *See Texas Build-Out Preemption Order*, 13 FCC Rcd. at 3499 ("We conclude that a build-out requirement would violate [the Act] if competitive entry were economically viable only when it was limited to a very confined geographic area").

[40] *See* February 18, 1999 *Ex Parte* Letter from Lynn S. Starr (Ameritech) to Magalie R. Salas (FCC), pp. 8-9.

what might be available in two years, would be unfavorable to Ameritech's stated interest in restricting unbundling.[41] But it is axiomatic that if a CLEC could enter the market in two months if it obtains access to network elements, but would be delayed for two years if it did not, then that CLEC would be "impaired" in its ability to offer service during those two years if it is denied access to the LEC's elements.

GTE's and Ameritech's proposals would diminish facilities-based competition in both the long term and the short term. There would be diminished facilities-based competition in the long term because these measures would deprive CLECs of the critical steppingstone that initial network element-based entry provides. And, as even these LECs admit, their recommended approaches would certainly mean diminished competition of every sort in the short term – for their approaches would, at a minimum, delay by years both CLECs' capability to provide ubiquitous alternatives to LEC services and their ability to offer competitive choices to the vast majority of customers.

The admission that there would, at a minimum, be a substantial delay in the development of mass-market residential competition means that the LECs' proposals would have far reaching implications for other Commission decisions that are predicated upon assumptions about the manner and speed at which local competition can develop. First, it would obviously affect the Commission's review of Section 271 applications. The Commission has properly recognized that one of the purposes of Section 271 is to ensure that BOCs cannot enter the long distance

[41] Indeed, in Ameritech's *ex parte*, the only element it concedes should be provided are loops – and even then only "in certain areas." *Id.* p. 10.

market at a time when they could use their local monopolies to "less[en] competition" and "gain an unfair advantage" by being the only carriers in their region able to offer bundled packages of local and long distance services (*i.e.*, "one-stop shopping").[42] Accordingly, it has held that Section 271 withholds permission for the BOCs to provide long distance service until they face "serious competitive pressure from new entrants" in their local markets.[43] If the incumbent LECs were to persuade the Commission to deny access to network elements today out of a belief that this approach would somehow promote broad scale competition in years to come, then, even under that mistaken premise, there would be no such "serious competitive pressure" in local markets at least until the end of that multi-year period – and Section 271 relief likewise could not be granted any earlier.

Other aspects of the Section 271 process would also require substantial modification. For example, in applying the "facilities-based competitor" requirement of Section 271(c)(1)(A), the Commission rejected arguments that the facilities-based competitor must have operations of some significant "geographic scope" within the BOC's state.[44] It did so based in part on the assumption that such a requirement was not necessary because once one competitive carrier is operating somewhere within a state, any other carrier elsewhere within the state purportedly

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[42] *See Qwest Order* at ¶ 7; *see also id.* ¶ 39 ("By conditioning BOC entry into the in-region, interLATA market on whether the local market is open to competition, Congress sought to ensure that, when the BOCs obtain authorization to provide long distance services, and thereby offer one-stop shopping, new entrants would also have the opportunity to provide a combined package of telecommunications services to consumers").

[43] *See Ameritech Michigan Order*, ¶ 18.

[44] *See id.* ¶ 76.

could "immediately" take advantage of the same interconnection agreement and "quickly" become "operational"-- thus establishing that competitive alternatives could "flourish rapidly throughout a state."[45] But whatever the merits of that reasoning, it is clearly premised on a presumption of widespread network element-based entry, for the signing of an interconnection agreement alone could not remotely enable facilities-based competition to "flourish rapidly throughout a state."[46]

Moreover, regardless of how the Commission construes Section 271(c)(1)(A), if it adopted the LECs' proposals here it could not find that interLATA entry would satisfy the "public interest" test unless and until the widespread facilities-based alternatives that the incumbent LECs predict have actually developed throughout the state. Such a requirement is warranted in any event, but will certainly be indispensable if the incumbents succeed here in restricting access to network elements today in the name of fostering facilities-based competition in years to come. In evaluating whether granting a Section 271 application would serve the public interest, the Commission has stated that it will examine whether "broad-based competitive

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[45] *See id.* ¶ 76 n.169 (citing House Report at 77).

[46] *See id.* ¶ 392. Indeed, in addressing Section 271's "facilities-based competitor" requirement, the BOCs argued strenuously – and contrary to their current claims – that network element-based entry was a valuable competitive alternative in its own right, rather than a counterproductive deterrent to facilities-based competition. This was their basis for contending that network elements should count as a CLEC's "own" facilities for purposes of this requirement. *See, e.g.*, *Ameritech Michigan Order*, ¶ 88 (noting argument of BellSouth and SBC that this interpretation of the requirement should be adopted because it would further Congress' intent to "provide competing providers with the flexibility to choose whether to build a particular facility or purchase unbundled network elements from the BOC"); *id.* ¶ 87 (noting Ameritech's argument that carriers using their own facilities or network elements, unlike resellers, "control" the facilities they use). The Commission itself then adopted this view. *See id.* ¶¶ 99 n.229, 100.

entry" has occurred in the state,[47] and if such entry has not occurred, it will look at other evidence to determine whether the local market has nonetheless been sufficiently opened so that "competitive alternatives can flourish rapidly throughout a state."[48] Without widespread availability of network elements, there will be no possibility that any BOC will be able to satisfy that standard in the near-term, for there would be neither broad-based entry nor an environment in which competitive alternatives could develop "rapidly."

Similarly, the Commission's approach to access charge reform would likewise have to be reconsidered and substantially revamped if the LECs' proposals here were adopted. The Commission recognized in the *Access Reform Order* that "[t]o fulfill Congress's pro-competitive mandate," access charges should "reflect rates that would exist in a competitive market."[49] It nonetheless rejected requests that it immediately prescribe access rates at cost based levels, and chose instead, at least initially, to rely on "market forces." But the Commission made clear that network element-based competition would be the primary mechanism for generating such market forces in the first several years. Indeed, almost without exception, the Commission's examples of how competitive pressures would constrain access prices involved a CLEC leasing unbundled network elements.[50] The Commission also relied upon the existence of network element competition in rejecting the arguments made by many commenters that the current above-cost

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[47] *See Ameritech Michigan Order*, ¶ 392.

[48] *See id.*

[49] *See Access Reform Order*, ¶ 42.

[50] *See, e.g., id.* ¶¶ 32, 337-338.

access charges would allow incumbent LECs to engage in anticompetitive price squeezes.[51] If the Commission were now substantially to limit access to unbundled elements in ways that were not contemplated in 1997, it would vitiate the basis for its earlier decision to rely on a market approach and require adoption of a prescriptive approach in its place.

B. The Commission Should Also Find That In These Markets Any Increase In Costs Would Impair CLECs' Ability To Provide Service And That, In Any Event, Requiring Unbundling To Prevent Such Cost Increases Would Further The Objectives Of The Act.

It is also the case that, under current market conditions, "any increase" in the costs to provide service incurred by CLECs that lease network elements will impair their ability to provide service. As Professors Hubbard, Lehr, and Willig explain, CLECs using network elements today operate at high risk and great uncertainty, and with only small potential returns. For these reasons, their ability to enter individual markets is extremely sensitive to changes in their costs.[52] That is particularly the case because, as discussed *supra* (pp. 23-24), CLECs necessarily face costs and risks greater than those faced by the incumbent LECs from whom they must win their customers.

The hypothetical described by the Supreme Court to illustrate the circumstance in which an increase in cost would not impair a CLEC's ability to provide service – in which the CLEC is

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[51] *See id.* ¶ 280. The Commission expressly acknowledged that an incumbent's control of exchange access facilities "may give it the incentive and ability to engage in a price squeeze." *Id.* ¶ 278. However, the Commission found that strategy unlikely to succeed, because if it were attempted, "under the provisions of section 251, a competitor will be able to purchase unbundled network elements to compete with the incumbent LEC's offering of local exchange access." *Id.* ¶ 280. The Commission emphasized that "so long as an incumbent LEC is required to provide unbundled network elements quickly, at economic cost, and in adequate quantities, an attempted price squeeze seems likely to induce substantial additional entry in local markets." *Id.*

[52] *See* Hubbard/Lehr/Willig Aff. ¶¶ 18-26.

making a 100% return on its investment and is merely reduced to earning 99%-- thus does not remotely describe the world in which CLECs actually must operate.[53] Conversely, the Court made clear that, under some economic conditions – such as where carriers are operating at the margins – a determination that any increase in cost would impair CLECs' ability to provide service "might be reasonable."[54] The Commission should find that those conditions manifestly are present today for CLECs. CLECs that wish to provide mass market competition, for example, would not now earn any profits if access to network elements were denied, much less a 99% return on investment. Moreover, if any such profits were in fact available, they could not conceivably be maintained – for additional CLECs would be drawn in by such opportunities, would enter themselves using network elements, and would keep on offering lower and lower retail prices until the prospect of supracompetitive profits had been competed away.

Indeed, any claim by incumbent LECs that this is not the case would be deeply ironic. The LECs have repeatedly denied that they recover supracompetitive profits themselves, claiming that they only recover their true economic costs. If that is so, then there is no price umbrella under which CLECs using network elements could price and recover "handsome" profits,[55] and in fact no reason to believe, with their cost disadvantages, that CLECs could recover any profits at all. On the other hand, if incumbent LECs are pricing substantially above their costs, then they will be able to underprice any CLEC whose own costs of service exceed the TELRIC of the element. And under those circumstances, no CLEC that recognizes that reality would even attempt to compete.

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[53] *See Iowa Util. Bd.*, 119 S. Ct. at 735.

[54] *See id.*

[55] *See id.*

Moreover, even if the Commission does not conclude that any increase in cost constitutes an "impairment" under present market conditions within the meaning of Section 251(d)(2)(B), it still could and should order unbundling wherever CLECs would otherwise incur higher costs. In that regard, the *Notice* asks (¶ 29) "how much weight the Commission must give to the ["necessary" and "impair"] requirements in order to satisfy section 251(d)(2) and the Supreme Court decision." The answer is clear from the statute and the case law: the Commission may choose to give them weight, but is not required to give them any weight at all. Section 251(d)(2) merely lists factors that the Commission must "consider, at a minimum." As the D.C. Circuit has explained, when a "statute by its terms merely requires the Commission to consider" specific factors, "[t]hat means only that it must 'reach an express and considered conclusion' about the bearing of a factor, but is not required 'to give any specific weight' to it."[56] Thus, in the *First Report and Order* (¶¶ 279-80), the Commission properly "agree[d] with BellSouth, SBC, and others" that the requirement that it "consider, at a minimum" the Section 251(d)(2) standards meant that those factors are not the exclusive determinants of which elements must be made available and that it is also required to consider any "other standards [that] are consistent with the objectives of the 1996 Act." The LECs likewise conceded this point before the Supreme Court.[57]

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[56] *See Time Warner Entertainment Co.* v. *FCC*, 56 F.3d 151, 175 (D.C. Cir. 1995) (citation omitted); *cf. Jones* v. *Bureau of Prisons*, 903 F.2d 1178, 1183-1184 (8th Cir. 1990) (where statute requires agency to consider factors "the weight to be given [them] is a matter of discretion").

[57] *See* Reply Brief of Cross-Petitioner US WEST, Inc. at p. 5, *AT&T Corp.* v. *Iowa Utils. Bd.* (filed July 17, 1998) ("no one claims these standards must always receive dispositive weight"); *accord*, Reply Brief for Cross-Petitioners Bell Atlantic, BellSouth Corp., and SBC at p. 21, *AT&T Corp.* v. *Iowa Utils. Bd.* (filed July 17, 1998); Reply Brief for Cross-Petitioner GTE Midwest Corp. at pp. 24-25, *AT&T Corp.* v. *Iowa Utils. Bd.* (filed July 17, 1998).

As the Supreme Court thus explained, the Commission's responsibility is to consider not merely the two factors set forth in Section 251(d)(2), but also to "take[] into account the objectives of the Act."[58] The 1996 Act's paramount such objective, of course, is to bring the benefits of competition, including lower prices, to consumers in local telephone markets. Even in the absence of a finding of "impairment," therefore, it would serve the Act's objectives to order unbundling whenever unbundling would lower costs to CLECs, for lower costs for CLECs will enable them to lower their own prices and put greater competitive pressures on the LECs, which, in turn, would bring lower prices more quickly to consumers.[59]

III. INCUMBENT LEC CLAIMS THAT *IOWA UTILITIES BOARD* REQUIRES OR SUPPORTS OTHER, MORE RADICAL CHANGES IN THE COMMISSION'S APPROACH ARE MERITLESS.

The incumbent LECs thus far have been able to use litigation and other tactics to frustrate and delay the implementation of the Act's central requirements relating to access to unbundled network elements. They procured a stay of the Commission's pricing rules that prevented the implementation of those rules in the arbitrations that occurred in the first three years under the Act and that has now been reversed by the Supreme Court. They refused to comply with at least some provisions of Rule 51.319 (such as the provision relating to shared transport) for the 28 months it was in effect. And they procured a decision from the Eighth Circuit on network element combinations that the Supreme Court has unanimously reversed, but that has similarly prevented any broad based competition with their exchange and exchange access services. These tactics have served the incumbents well. It has allowed them to put off the day when they will

[58] *See Iowa Utils. Bd.*, 119 S. Ct. at 736.

[59] *See* Hubbard/Lehr/Willig Aff. ¶¶ 27, 35.

face any widespread competition. It has further allowed them to proclaim the Act a failure and to lobby Congress to change it.

The incumbent LECs' response to the Supreme Court's decision to remand Rule 51.319 is thus scarcely surprising. Although the decision is exceedingly narrow, the incumbents have sought to use it to launch a new set of wholesale challenges to those aspects of the 1996 Act that they do not like. They have sought to relitigate determinations made in the *First Report and Order* that were either not challenged on appeal or that were explicitly affirmed by the Eighth Circuit, the Supreme Court, or both. And they have launched these challenges without acknowledging that the Commission could not accept them without revoking a series of other conclusions the incumbent LECs themselves approve regarding Section 271 and access charge reform. Each of these constitute collateral attacks on the 1996 Act and the *First Report and Order* and should be rejected.

This section of AT&T's Comments addresses the challenges that have surfaced most prominently in the incumbent LECs' advocacy since *Iowa Utilities Board* – in particular, their claims (1) that the responsibility for considering the Section 251(d)(2) factors and identifying network elements should devolve to the 50 States, with the Commission's role limited (at most) to setting general standards that the States would then apply, and (2) that Section 251(d)(2) codifies the "essential facilities" doctrine that has developed in the lower courts under the antitrust laws. Neither these claims nor the others the incumbent LECs are advancing have any basis in anything the Court said, and each would be both contrary to the Act and unsound policy.

A. The Commission's Tentative Conclusion That It Should Adopt Categorical National Rules Is Clearly Correct.

In the *First Report and Order*, the Commission concluded that identifying a list of network elements that must be made available on a nationally uniform basis would promote the

Act's objective of fostering local competition. It determined that nationally uniform rules, among other benefits, would enable requesting carriers to take advantage of economies of scale, would provide financial markets with greater certainty, and would minimize anticipated litigation.[60]

In determining itself which network elements would be required to be unbundled, the Commission followed the course established by the Act. With respect to several other specific issues, the Act envisions a two-step process in which the Commission sets standards and the States then apply those standards to determine a final result.[61] Section 251(d)(2), by contrast, provides that "[i]n *determining* what network elements should be made available for purposes of subsection (c)(3) of this section, *the Commission* shall consider, at a minimum," the "necessary" and "impair" standards.[62] The Act thus charges the Commission with making these "determin[ations]" itself, rather than directing that localized determinations be made by and for each State. As with the competitive checklist of Section 271 – which sets preconditions for all BOCs, regardless of region, to unbundle loops, switching, and transport, and provide nondiscriminatory access to signaling, operator services, and directory assistance (*see* Section

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[60] *See First Report and Order* ¶¶ 241-248.

[61] That is generally true, for example, with respect to pricing, where the Commission sets rules pursuant to Section 251(c)(3) and the States "establish . . . rates" under those rules pursuant to Sections 252(c) and 252(d); it is true with respect to rural exemptions, where the Commission sets rules that the States then use to "determine[]" whether the exemption applies to particular LECs, *see* Section 251(f) & *Iowa Utils. Bd.*, 119 S. Ct. at 733; and it is true with respect to the Act's resale provisions, which provide that "a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit" certain types of cross-selling to different classes of customers by resellers, *see* Section 251(c)(4)(B).

[62] *See* 47 U.S.C. § 251(d)(2) (emphasis added).

271(c)(2)(B)) – Section 251 contemplates that the core list of required network elements will be established nationally.

Congress thus recognized that local competition could not emerge rapidly, if at all, if the most fundamental question of which incumbent LEC facilities would be available to new entrants had to be litigated and relitigated on a state-by-state or locality-by-locality basis. And the experiences of the last three years vividly confirm that Congress was correct. The effectiveness of litigation as a tool for foreclosing local entry, or reducing it to a slow crawl, has become painfully clear. New entrants into monopoly markets, and those who would invest in them, require a measure of certainty and stability for a significant period of time in order to formulate, support, and execute rational business plans. None of that is possible when the most critical premises for such plans are perpetually in play in multiple litigations before courts and state commissions across the country. Those obstacles to entry are especially acute in this context, where incumbent LECs have lawlessly asserted that the mere pendency of litigation is a sufficient basis for refusing to comply with final and effective agency orders with which they disagree.[63]

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[63] For example, after Ameritech sought and was denied a stay of the Commission's *Shared Transport Order*, which required incumbent LECs to provide shared transport as a network element, Ameritech maintained that it would nonetheless violate that Order:

> "The shared transport order of the FCC is currently on appeal by Ameritech. We believe that the shared transport order is unlawful and we would not – or have no intention of complying with that order until its legality is finally determined."

4/23/98 Tr. p. 7, Public Utilities Commission of Ohio Case No. 96-327-CT-ACE/96-658-TP-ACE. Ameritech has since confirmed to the Commission that it regards itself obligated to comply only with "non-appealable" orders – i.e., those orders for which all options to challenge them through litigation have been exhausted. *See* Joint Opposition of SBC Communications, Inc. and Ameritech Corp. to Petitions to Deny and Reply to Comments, Appendix A at 12-13, *In the Matter of Application for Consent to the Transfer of control of Licenses and Section 214* (continued . . .)

And the extent of such litigation would dwarf even the experiences of the last three years, because this time it would be endless. For after however many years it might take to litigate through appeals an incumbent LEC's claim that a particular element need not be available, the incumbent LEC would, if defeated, simply file a new petition claiming that intervening market developments during the course of litigation require yet another investigation and a different conclusion. The *Notice* commendably states that the Commission intends "quickly to resolve the issue of which network elements incumbent LECs must make available on an unbundled basis, in order to reduce uncertainties in the marketplace and to allow carriers to make informed and rational business decisions in order to provide service on a competitive basis to consumers."[64] But if the Order here merely sets in motion a new process of interminable state-by-state, element-by-element proceedings, it would resolve nothing, and simply thicken "[t]he black cloud of litigation that has delayed competition for so long."[65]

Incumbent LECs have suggested, however, that this result is compelled by the Supreme Court's conclusion that the Act requires the Commission to consider the potential for substitutes for UNEs. They argue that since the degree of substitutability could theoretically vary in different local markets, the Act requires a series of localized applications of the "necessary" and "impair" factors rather than a national one. But that suggestion is profoundly in error. To begin

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(. . . continued)
Authorizations from Ameritech Corp. to SBC Communications, Inc., CC Docket No. 98-141 (filed Nov. 16, 1998).

[64] *See Notice* ¶ 2.

[65] *See* Press Statement of Commissioner Susan Ness Regarding Supreme Court Ruling – AT&T v. Iowa Utilities Board (Jan. 25, 1999); *see also* Statement of Chairman William E. Kennard on AT&T v. Iowa Utilities Board (Jan. 25, 1999) ("It's time to stop investing in litigation and focus instead on opening local phone markets to competition").

with, as noted above, the Act itself rejects any such implication. Section 251(d)(2) commands the Commission to consider the availability of substitutes in Section 251(d)(2), but that same section directs "the Commission" to "determin[e]" which network elements must be made available.

Nor did the Supreme Court accept the notion that consideration of substitutability requires localized determinations. The incumbent LECs made an express plea for that result at oral argument.[66] The Court, however, expressly stated that the Act "requires *the Commission* to determine on a rational basis *which* network elements must be made available."[67] Indeed, the Court went out of its way to note that the Commission's discussion of at least some of the elements in the *First Report and Order* included findings that indicated that a decision to make those elements available was "supported by [the] higher standard" the Court held the Commission must consider, and the Court vacated Rule 319 in its entirety only because that higher standard had not been "consistently applied."[68] Because the *First Report and Order* made

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[66] *See AT&T* v. *Iowa Utils. Bd.*, Case No. 97-826, Oral Argument Transcript at 67 (Oct. 13, 1998):

> MR. BARR: We are dealing – first, I would bear in mind that we're dealing with local markets, and I – and the FCC promulgates – has the tools to address local markets. They promulgate rules every day of the week that make distinctions between concentrated urban markets and dispersed rural markets. Every day of the week. Moreover, they have the tool of arbitration which gets you down to a carrier-by-carrier level. They could easily say in New York where there are dozens of switches, in New York where there are companies that have built from soup to nuts entire networks – there are people building it today without taking any of our pieces. They could say that in certain markets, certain kinds of businesses don't need certain things.

[67] *See Iowa Utils. Bd.*, 119 S. Ct. at 736 (first emphasis added; second emphasis in original).

[68] *See id.*

each of those network element determinations on a national, categorical basis, it is clear that nothing in the Court's opinion requires a more localized set of determinations after the remand.

Further, as described above (*see supra* pp. 37-38), Section 251(d)(2) expressly permits the Commission to consider factors other than those relating to "necessary" and "impair." The Commission is therefore free to consider – and it would be arbitrary not to – whether any presumed benefit from making particularized determinations concerning "necessary" and "impair" for each locality would outweigh the massive costs to the system of litigating these issues everywhere simultaneously.

Here, any such analysis overwhelmingly supports the Commission's tentative conclusion to adopt a single set of minimum national rules, for the costs of piecemeal litigation would be enormous and any benefit from particularized determinations would be minimal or non-existent. The Commission's conclusion in the *First Report and Order* (¶ 244) that "any differences that may exist among states are not sufficiently great to overcome the procompetitive benefits that would result from establishing a minimum set of binding national rules" is as true today as it was in 1996. To take the example cited by GTE before the Supreme Court (*see supra* p.43 n. 66), there are certainly some differences between the markets in New York City, where some CLECs are using their own switches to serve niche market segments for business customers, and, say, rural Oklahoma, where no such activity has taken place. But as these Comments show (*see infra* Section IV.B), none of those differences are material to this proceeding, for even in New York CLECs would be impaired in their ability to serve the vast majority of customers if they were

unable to obtain access to unbundled switching.[69] The development of competitive markets is in its infancy, even in those areas where competition has progressed the most. Thus, the availability of usable alternatives throughout the country spans only the narrow range between very slight and none. As a consequence, the exhaustive localized analyses that the LECs seek to require would, if conducted correctly, lead at this time to a nationally uniform result in any event – but only after substantially raising costs and impeding entry.[70]

Finally, two other non-categorical approaches have been suggested that would neither comport with the Act nor further its policies. First, Commissioner Powell's Separate Statement noted, without endorsing, the possibility of adopting not only a market-by-market approach but a carrier-by-carrier approach as well.[71] Such an approach would be precluded by (i) Section 251(c)(3)'s requirement of "nondiscriminatory access," which the Commission has explained requires that access to elements "be equal between all carriers";[72] (ii) Section 251(c)(3)'s requirement that network elements be made available to "any" requesting carrier, which the Supreme Court relied upon in rejecting LEC claims that a lawful distinction could be made

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[69] Indeed, in New York City, where AT&T is attempting to use its own switches, it is experiencing enormous problems with the provisioning of unbundled loops. *See infra* Section IV.B.

[70] In all events, if a LEC were in fact to identify an outlier locality in which the result would be different, an approach based on nationally uniform rules would not prevent the Commission from taking that into account. Any Commission rule may be the subject of a petition for waiver under Section 1.3 of the Commission's Rules (47 C.F.R. § 1.3), and it would be open to any LEC to make a demonstration that satisfies the requirements for a waiver. Such a procedure would properly focus any such adjudications on the small number of instances, if any, in which a deviation from a national norm could be defended – and would thus appropriately make subsequent litigation over the identification of network elements the exception rather than the rule.

[71] *See Notice*, Separate Statement of Commissioner Powell, p. 5 n.11.

[72] *See First Report and Order* ¶ 312.